IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

CHARLES GAGNON, *Appellant*,
v.
THE UNITED STATES and THE SIOUX AND CHEYENNE INDIANS. } No. 163.

BRIEF IN REPLY.

Order not Under Rev. Stat. U. S. §§ 899, 900.

The brief for the United States is in error in the suggestion (pp. 1–3) that the proceedings taken in the District Court for Richardson County, Nebraska, for the restoration of the record of naturalization were based upon Sections 899 and 900 of the Revised Statutes of the United States. These sections relate only to courts of the United States and have no application to State courts.

Richardson County Court Held in 1863.

In order to controvert the validity of the order of the State court restoring its own records, counsel for the United States are driven to deny that there was a term of court held in the year 1863. But no evidence of this is offered beyond their own statement to that effect. No such fact is stated in Finding V, upon which a labored argument (pp. 6–11) is based, to show that no term of the Richardson County Court was held in that year.

This speculation as to what the records of the district

court show indicates more clearly than anything else the impropriety and danger of permitting the Court of Claims in a proceeding purely collateral, upon evidence *aliunde*, to pass upon the legality of the action of the district court, in a matter so *peculiarly within the jurisdiction* of the court controlling its own records. The Court of Claims proceeded upon the theory that Finding V showed the records of the district court were complete and intact for 1863 (Rec. p. 7). The journal for that year is not shown by such finding to be in the court. The most that counsel for the United States even claim for the probative force of that finding is that there is a "reasonable presumption" that the journal is in court and that the real "significance" of the finding is that there was no term held in 1863. Of course, even *reasonable* presumptions can not controvert facts of record appearing in Finding IV (p. 3). The proposition that there is nothing to amend by is fully met by the consideration that under the law in force in 1863 (quoted on page 10, appellant's brief) no written papers were required, other than the record of the proceedings which it was the duty of the clerk to make. To say that the court has no power in such a case to make the records kept by the clerk speak the truth, is to make the clerk more powerful than the court itself. For what the clerk fails to record can not be recorded and what he erroneously enters up can not be changed and this notwithstanding the action of the court may have been entirely different.

The only safe rule is that every court has the exclusive control over its own records and what it orders recorded must stand as verity unless revised for error in a proper proceeding. Endless confusion would result from any doctrine which would permit one court to refuse to accept a judicial record because convinced by

evidence *aliunde* that the action of the first court should not have been taken.

Citations for United States Examined.

There is not a case cited wherein a restored record has been set aside in a collateral proceeding.

The cases cited for the United States do not sustain the proposition that a court has no power to order its clerk to record that which was done by the court but not recorded by the clerk, or if recorded the record of which has been lost, at any time and upon any competent evidence satisfactory to that court.

State ex rel v. *Primm*, 61 Mo. 166, cited p. 18; *Culver* v. *Cougle*, 165 Ill. 417, cited p. 17; *Coughran* v. *Gutcheus*, 18 Ill. 390, cited p. 4, decide that existing judicial records can not be contradicted by parol evidence at a subsequent term.

Albers v. *Whitney*, Story, 310, cited p. 16; *Russel* v. *McDougal*, 3 S. & M. (Miss.) 234, cited p. 16; *Moody* v. *Grant*, 41 Miss. 565, cited p. 17; *Shackleford* v. *Levy*, 63 Miss. 128, cited p. 15, involve the correction of errors of the court in judgments actually rendered, not errors of the clerk in recording them.

Burney v. *Boyett*, 1 How. (Miss.) 39, cited p. 15, is wholly irrelevant, involving the question of which of three judgments rendered the same day is entitled to priority in matter of satisfaction.

The extract from *Boyd* v. *Blaisdell*, 15 Ind. 73, cited p. 17 and quoted as the action of this court, p. 18, is, as the court says, an "observation or two" to draw attention of the profession to the power of the courts to make alterations in records. It is not law but *dictum* and even this relates to "altering a judgment" and does not attempt to say that errors of clerks can not be corrected by the court.

Makepeace v. *Lukens*, 27 Ind. 435, cited p. 13, and *Mitchell*

v. *Lincoln*, 78 Ind. 531, cited p. 14, are Indiana decisions, which, as we pointed out on page 32 of our brief, are admitted by the Supreme Court of that State to be in conflict with decisions in other States.

Lynch v. *Reynolds*, 6 Bush (Ky.) 547, cited on pages 11 and 14, is one case squarely in point, but it rests upon a single precedent, *Vandever* v. *Griffith*, 2 Metc. (Ky.) 425, in which was involved the validity of a *nunc pro tunc* filing of a bill of exceptions which had not been filed at the preceding term.

The quotation from *Balinski* v. *State*, 3 Minn. 427, on page 14, expressly admits the power of the court to amend a record after the term. If the opinion is examined it will be found to be a strong authority for appellant.

A Circuit Court Decision by Justice Grier.

Cromwell v. *Bank of Pittsburg*, 2 Wallace Junior (not Wallace as cited by counsel for the United States, p. 16 of his brief) 569, 586, is also a strong authority for appellant. It is also reported 6 Federal Cases, No. 3409.

The entire paragraph is not quoted in brief for the United States and the words italicized are not italicized in the opinion. They are merely incidental and not the controlling language as would appear from appellee's statement. The entire paragraph should be read. After the words quoted by appellee it continues as follows:

"It is a power vested in every court, and one which it is their duty to exercise in a proper case, in order that suitors may not suffer by the carelessness or mistakes of clerks and officers. It is a power committed to the discretion of the court, to be exercised over their own records, and the correct use of that discretion can not be questioned by another court, even on a writ of error. The jurisdiction of the court does not depend on the consent or presence of the parties to the suit, but on the power of

the court over its own records. A record is received as absolute verity, and it is the duty of the court to see that it speaks the truth and the whole truth. If the amendment made is according to the truth, the parties have no right to complain. If it be alleged that the amendment was ordered on a false suggestion, the party making such allegation should apply to the court to vacate or set aside such order for that reason. The court of common pleas of Allegheny county having decided that a judgment was confessed by Cromwell on the 13th of September, 1820, and that it should have been entered by the clerk on the docket, and having ordered that omission to be amended nunc pro tunc, it is conclusive evidence to this court that such a judgment was rendered or confessed on the 13th of September, 1820. The complainants in this case can not question its propriety or deny its effects."

It appears from the facts stated in the opinion that the practice was for the clerk to make a record of judgments in a rough docket and then to transfer the entry to the large and more permanent one. The first mentioned docket could not be found and the second mentioned docket contained no record of the judgment. Yet the court held from a paper found in the court and from the entry of a *levari facias* that there was a conclusive presumption that there had been an entry in the rough docket, which had been lost and which the prothonotary had neglected to afterwards copy into the folio docket, and the court goes on to say:

"If after such a length of time titles could be called in question for want of mere writ, docket or other memorandum, no man's property in Pennsylvania would be safe; and more especially would this be the case in Pittsburg where processes of execution on which valuable titles depend, is often found among the papers of deceased attorneys and sheriffs, who have sometimes moved to near or to distant places and states, and where the archives of the court are treated as useless lumber."

So far from this case deciding that no amendment can be made unless there is some memorandum in the court to amend by it is fair to presume that if the case had required a decision on this point the court would have reached a conclusion similar to the conclusion reached by this court in the matter of *Wight* and by other courts in the numerous other cases cited by appellant on pages 29 to 32 of his brief.

Conclusion.

The question in this case is a simple one. The District Court of Richardson County, Nebraska, has certified that there remains in that court a record of the naturalization of Charles Gagnon, the claimant in this case, on September 25, 1863. The Government attempts to impeach that record by showing that it was not actually made up until some years after the occurrence of the proceedings therein recited. Can the record of the proceedings of the State Court be thus impeached for the reasons hereinbefore set forth? It is submitted that it can not, and that in whatever form it has been prepared, or at whatever time it has been made up, it is conclusive.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Claimant.